7997-8

NO. 58515-1-II

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Curtis A. Beaupre, Plaintiff/Respondent

v.

Pierce County, Defendant/Appellant

REPLY TO OPPOSITION TO MOTION TO STRIKE

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Table of Contents

Table of Authorities

Page

Cases

Other Authorities

Rules

I. INTRODUCTION

At various points in his Answer to Pierce County's Motion to Strike, plaintiff attempts to argue also his own unsuccessful Motion on the Merits. See Ans. to Mot. to Strike, pp. 4-6. Because those arguments do not address the instant motion and have since been rejected, the instant Reply discusses only plaintiff's assertions relevant to defendant's Motion to Strike.

II. FACTUAL CLAIMS RELEVANT TO MOTION

Plaintiff's Answer claims the subject discovery materials and his attempted use thereof should not be stricken because during oral argument on summary judgment his counsel supposedly "opened and read the appropriate interrogatory, and offered to hand the interrogatories up to the court." Ans. to Mot. to Strike, p. 2. This newest version of oral argument provides far more detail than plaintiff was originally willing to offer the trial court in his unsuccessful motion to supplement the record after review was granted. CP 220-221 (making only the conclusory claim that plaintiff in some unexplained way "called the

Court's attention" to the document during oral argument.) Nevertheless, plaintiff not only fails to cite anything in the record supporting this assertion, but has done nothing to make the transcript of that hearing a part of the Clerk's Papers or even attach it to his Answer. Compare Mot. on Merits, ex. "A." The Clerk's Papers instead affirmatively reveal that the subject discovery responses were never mentioned or authenticated in plaintiff's opposing affidavit, never argued in or attached to his summary judgment brief and never filed with the Court at any time prior to its summary judgment order. CP 82-99, 179-212. Indeed, the summary judgment order itself -- drafted and signed by plaintiff's counsel -- nowhere notes such an interrogatory was ever called to the attention of the Court as required by CR 56(h) despite the space provided thereon to do so. CP 116-117.

Plaintiff attempts to explain away at least the summary judgment order's failure to list those documents by oddly claiming that because the materials in question "were only called to the attention of the trial court during oral argument,

they had not listed [sic] in the proposed order offered by either party." Ans. to Mot. to Strike, p. 3 (emphasis added). Such revisionism directly conflicts with CR 56(h) which expressly provides that summary judgment orders "shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." (Emphasis added). The Answer's unsupported representation of plaintiff's alleged actions during oral argument violates RAP 9.1(b), RAP 9.12, RAP 10.3(a)(5) and RAP 10.4(f), and therefore should itself be stricken. See State v. Skiggin 58 Wn.App 831, 839, 795 P.2d 169 (1990) (Matters asserted in a brief not supported by the record are subject to a motion to strike).

Next, plaintiff's Answer similarly attempts to explain away the trial court's later denial of his motion to supplement the record under RAP 7.2(b) and RAP 9.12. CP 236-237. Specifically, the Answer speculates that the reason for its denial "may well be that the court did not find this evidence material to its ruling on the motion for summary judgment ...." Ans. to

Mot. to Strike, p. 3. However, as a matter of law and fact the issue at the time of the motion to supplement was not what the trial court had deemed "material" at summary judgment, but instead -- as required by the rules and as expressly argued by plaintiff himself to the trial court -- "the sole issue raised [was] whether" the discovery materials had been "called to the Court's attention before the Order on Motion for Summary judgment was entered ...." CP 221. See also RAP 9.12 (authorizing supplementation of the record with documents "called to the attention of the trial court but not designated in the order ....")

Hence, there similarly is no basis for plaintiff's assertion that his motion to supplement was -- or could be -- denied for any reason other than that the trial court concluded the subject documents had not been "called to [its] attention" before its ruling on summary judgment. See RAP 9.12.

III. GROUNDS FOR RELIEF AND ARGUMENT

Plaintiff does not contest that the discovery materials he

now asks this Court to consider were not part of the record at time of the summary judgment order, were not listed in that summary judgment order and were not held by the trial court under RAP 9.12 to have been "called to the attention of the trial court but not designated in the order ...." See CP 179-212, 116-127, 236-37. Further, plaintiff expressly admits he chose not to object under RAP 9.13 to the denial of his motion to supplement because the discovery requests in question are merely part of "a 'make weight' argument" in his Motion on the Merits. See Ans. to Mot. to Strike, p. 4. Finally, he neither explains how the material can be considered in light of his unsuccessful RAP 9.12 motion and failure to object nor addresses the County's numerous citations to clear contrary language of the appellate rules and case law. See Mot. to Strike, pp. 3-8.

Rather, in direct conflict with those cited appellate rules and decisional law, plaintiff simply asserts that his argument on appeal "need not be based solely on evidence considered by the trial court; but logically may also be based upon other pleadings

and proof in the case." Ans. to Mot. to Strike, p. 5. Though plaintiff is correct that a trial court's decision may be sustained on "any theory within the pleadings and the proof," id., he ignores that such "proof" must first have been part of the record at the time the trial court's ruling was made. Our Supreme Court has expressly held that "evidence not on the record before the trial court at the time of the summary judgment" should be stricken because it "was never considered by the trial court nor submitted to the court in deciding the summary judgment." Nelson v. McGoldrick, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995). See e.g. also Snedigar v. Hodderson, 114 Wn.2d 153, 164, 786 P.2d 781 (1990)("record on appeal may not be supplemented by material which has not been included in the trial court record."); Whatcom County v. State, 99 Wn.App 237, 246, fn 25, 993 P.2d 273, 278 (2000)(Division I declined "to consider facts and arguments presented in its supplemental clerk's papers, which were not presented to the trial court below" because a "party may not supplement the record on appeal

of a motion for summary judgment with materials not presented to the trial court.")

The reason such materials must be stricken from appellate consideration is because on review of an order of summary judgment, "this court engages in the same inquiry as the trial court." See Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). A trial court on summary judgment is required by the civil rules to consider only evidence submitted by "affidavits ... made on personal knowledge" that "set forth such facts as would be admissible in evidence, and ... show affirmatively that the affiant is competent to testify to the matters stated therein," while "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." See CR 56(e). See also e.g. Mackey v. Graham, 99 Wn.2d 572, 576, 663 P.2d 490 (1983) ("party seeking to avoid summary judgment . . . must affirmatively present the factual evidence upon which he relies.") (emphasis added); Brown v. People's Mortgage Co., 48 Wn. App.

554, 558, 739 P.2d 1188, 1191 (1987)(same). For this reason, on appeal "RAP 9.12 codifies the requirement that the order on summary judgment specifically set forth those documents presented to the trial court ... in opposition to the motion ...." 1 Washington Appellate Practice Deskbook, §15.11 at p. 15-19 (Third Ed., 2005)(emphasis added). See also Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (quoting Wash. Fed'n of State Employees v. Office of Fin. Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993))(RAP 9.12 effectuates "the rule that the appellate court engages in the same inquiry as the trial court.'")

Here the record confirms no "sworn or certified copies" of the subject materials were ever presented in plaintiff's opposing affidavit, at oral argument or at any time prior to the Court's summary judgment order. See CP 179-212. Further, even if plaintiff could prove his unsupported allegation that he supposedly at least mentioned the discovery in oral argument, such would not constitute having it "called to the attention of the trial

court before the order on summary judgment was entered" as required. Compare e.g. Mithoug v. Apollo Radio, 128 Wn.2d 460, 462-463, 909 P.2d 291 (1996) (documents "were called to the attention of the trial court" when "the court entered an order allowing them to be filed and the plaintiffs referred to them by page and line numbers in their memorandum."); Skeie v. Mercer Trucking Co., 115 Wn.App. 144, 147, 61 P.3d 1207 (2003) (document was "called to the attention of the trial court and is properly before this court in the record on appeal" where plaintiff "filed [it] along with other affidavits on the same day he filed his response to Mercer's motion for summary judgment.")

Pursuant to this Court's rules, binding precedent and the trial court's express and unappealed ruling, the documents relied upon by plaintiff were not properly included in the Clerk's Papers or as attachments to plaintiff's Motion on the Merits.

IV. CONCLUSION

For the above stated reasons, defendant respectfully requests this Court strike from the Clerk's Papers all documents

relating to plaintiff's unsuccessful trial court motion to supplement the record with material not previously offered or considered at summary judgment, as well as strike references to and any attachment of those same documents.

DATED: January 29th, 2007

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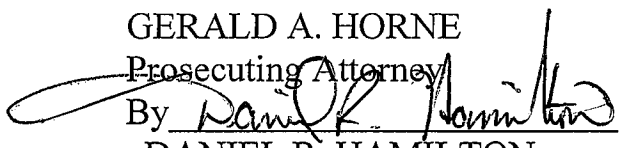
By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2007, a true copy of Pierce County's Reply to Opposition to Motion to Strike was forwarded by United States Mail, postage prepaid, to:

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